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Supreme Court of the United States

OCTOBER TERM, 1934

No. 534

CLARENCE NORRIS
against
STATE OF ALABAMA.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1934

CLARENCE NORRIS,
Petitioner,

against

STATE OF ALABAMA,

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

I

OPINION OF THE COURT BELOW

The opinion has not yet been officially reported. It appears in the Southern Reporter advance sheets of October 25, 1934, 156 Southern 556 and at pages 676-695 of the record. An application for rehearing was denied without opinion (705-706).

II

STATEMENT OF THE CASE

Petitioner is one of nine Negro boys who is charged with having raped two white girls Victoria Price and Ruby Bates. The crime is alleged to have been committed while the parties were riding on a freight train through Jackson County, Alabama on March 25, 1931.

The nine defendants were tried in Jackson County, Alabama in the Spring of 1931 and all of them

were found guilty of the crime of rape and their punishment fixed at death with the exception of one, Roy Wright, in whose case the jury were unable to agree and a mistrial was ordered by the court. Appeals were taken to the Supreme Court of Alabama which Court affirmed the decision of the lower court as to all of the defendants except one, Eugene Williams, (*Patterson vs. State*, 224 Ala. 531, 141 So. 1955; *Powell et al vs. State*, 224 Ala. 540, 141 So. 201; *Weems et al vs. State*, 224 Ala. 524, 141 So. 215) Thereafter the defendants appealed to the Supreme Court of the United States which Court reversed the decision of the Supreme Court of Alabama on the theory of inadequate representation by counsel (*Powell et al vs. State of Alabama*, 287 U. S. 45). The petitioner in the instant case was originally tried jointly with one, Charlie Weems. The circumstances of that case are reported in the Weems case, supra.

After the cases had been remanded to the Circuit Court of Jackson County for retrial, a motion for change of venue was filed on behalf of the defendants which motion was granted and the cases transferred to the Circuit Court of Morgan County, Alabama.

Heywood Patterson, one of the nine defendants, was put to trial in Morgan County, Alabama in the spring of 1933 and was convicted. Judgment of conviction was subsequently set aside by the trial judge.

There was a motion filed on behalf of all of the defendants to quash the indictment as well as the trial venire when the cases were called for trial before Judge Callahan in the Circuit Court of Mor-

gan County, Alabama in November of 1933. (50) (418) The State denied each and every allegation of the motion to quash the indictment as well as the motion to quash the venire. (57) (429) The ground on which the defendants based their claim that the indictment and the trial venire should be quashed was that Negroes had been arbitrarily and systematically excluded from the juries in Jackson County wherein the indictments were found and in Morgan County wherein the cases were tried. Many witnesses were called and much testimony placed before the trial judge who denied both motions. (163-167) (491-494).

The defendant was found guilty on December 6, 1933 and was sentenced to death on the same date. He appealed to the Supreme Court of Alabama which Court affirmed the decision of the lower court.

III

QUESTIONS PRESENTED

On page 8 of the brief filed in this Court by counsel for petitioner are set out the rulings of the court below which petitioner urges are erroneous. They are three in number and are as follows: (1) That the Court denied petitioner's constitutional rights in refusing to quash the indictment by the grand jury in Jackson County; (2) The Court denied petitioner's constitutional rights in refusing to quash the venire of the petit jury in Morgan County; (3) The Court denied petitioner's constitutional rights in refusing to permit petitioner full opportunity to prove that Negroes were systematically excluded.

The State of Alabama recognizes the principle as stated by counsel for petitioner in their brief wherein they state that the indictment of a member of he Negro Race and his conviction by a jury from which Negroes are systematically excluded is a denial of equal protection of the law. However, the evidence presented to the trial judge in this case and afterwards reviewed by the Suprme Court of Alabama does not disclose that Negroes were systematically and arbitrarily excluded from the juries of Jackson County because of their race or color in controvention of the Fourteenth Amendment to the Constitution of the United Staes.

IV

REVIEW BY THE SUPREME COURT OF THE UNITED STATES

Whether or not discrimination against Negroes because of their race or color was practiced by the Jury Commissioners in the selection of grand or petit jurors is a question of fact, the decision of which by the State Court is conclusive on the Federal Supreme Court unless so grossly wrong as to amount to an infraction of the Federal Constitution.

The petitioner's sole hope for relief before this Honorable Court is based on his contention that the petitioner was denied those constitutional rights guaranteed him by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Petitioner admits in his brief, filed in support of his petition, that Section 14 of Act No. 47, H. B. 70,

approved February 20, 1931 (General Acts 1931, page 55) which prescribes the qualifications of jurors and the method by which their names are placed in the jury boxes of the State of Alabama is constitutional. Said section is practically identical with Section 8603, Code of Alabama, 1923.

This Honorable Court, in the case of *Franklin vs. South Carolina*, 218 U. S. 161, 54 L. Ed. 980, held that a state law fixing the qualifications of jurors which qualifications were practically the same as the Alabama statutes now under consideration, was constitutional. Petitioner contends, however, that although the statute of Alabama providing for the selection of those persons to sit on the juries is constitutional that the Jury Commissioners have not complied with the law and have arbitrarily excluded Negroes because of their race or color.

The State of Alabama in the trial of this case did not file demurrers to the motions to quash nor did it in any way admit the truthfulness of the allegations contained in petitioner's motions nor did the State in any way prevent or attempt to prevent the petitioner from legally proving the truthfulness of the allegations contained in said motion.

The State denied the allegations of the motion thus putting the burden of proof on the petitioner to prove the truthfulness of his allegations and we respectfully submit that the proof offered in support of the motion wholly failed to establish the fact that the members of the Jury Commission or Jury Board of the counties of Jackson and Morgan systematically and arbitrarily excluded from the jury

rolls of their respective counties the names of members of the African race purely because of race or color.

We fully recognize the principle as laid down in *Strauder vs. West Virginia*, 100 U. S. 303; *Neal vs. Delaware*, 103 U. S. 370; *Carter vs. Texas*, 177 U. S. 442; *Martin vs. Texas*, 200 U. S. 316, but we respectfully submit that those cases do not in any way decide the question presented in this case.

The cases above cited not only state the general principle that statutes which prohibit members of the African race from serving as jurors because of their race or color are unconstitutional but also provide that where a member of a person of the African race is indicted or tried by a jury from which the members of his race have been arbitrarily and systematically excluded, that he is denied equal protection of the law as guaranteed him by the Constitution of the United States.

The instant case differs from most of the other cases which have been before this Court on the question of exclusion of Negroes from serving as jurors because of their race or color in that the State of Alabama has merely denied the allegations of the petitioner's motions to quash, thus placing upon him the burden of sustaining the allegations. The only case which the writers of this brief have been able to find which deals in any way with the questions presented in this case is *Thomas vs. Texas*, 212 U. S. 295 Sup. Ct. 393, 53 L. Ed. 512, which case we will later discuss.

In other words, the question presented at this time and at this stage of the proceedings is whether or not the Supreme Court of the United States will review a finding of fact made not only by a nisi prius court of the State of Alabama but by the Supreme Court of that State.

The Supreme Court of Alabama, in its opinion in this case, fully discusses the question as to whether or not the evidence presented in support of petitioner's motion was such as to render the judgment or decision made by he trial court erroneous.

This Court, in the case of *Thomas vs. Texas*, 212 U. S. 278, held as follows:

> Where neither the constitutionality of a state statute nor the interpretation of the state court is assailed, but the contention is that Negroes were excluded from the juries because of their race or color, the question is one of fact and the decision of the state court is not reviewable by this court under Section 709, Rev. Stat. in the absence of such gross abuse as to amount to denial of due process of law.

The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry in the Supreme Court of the United States. *(Smiley vs. Kansas*, 196 U. S. 447).

To this general rule there are two equally settled exceptions: (1) Where a Federal right has been denied as the resuit of a finding shown by the record to be without evidence to support it; (2) Where a conclusion of law as to a Federal right and

findings of fact are so entangled as to make it necessary in order to pass upon the Federal question to analyze the facts.

Northern Pacific R. R. vs. North Dakota, 35 Sup. Ct. 429, 236 U. S. 585.

We respectfully insist that the evidence presented to the trial court in support of petitioner's motions to quash was totally insufficient to sustain the allegations of petitioner's motions and that the judgment or decision of the trial court, as well as that of the Supreme Court of Alabama, is completely justified by the evidence or lack of evidence presented and that the evidence is not such as to bring this case within the exceptions to the rule that the decision of a state court upon a question of fact cannot be made a subject of inquiry in the Supreme Court of the United States.

POINT I

MOTION TO QUASH INDICTMENT

The Jury Commissioners of Jackson County, Alabama were charged with the duty of placing on the jury rolls of Jackson County the names of all male citizens of the county who were generally reputed to be honest and dependable men and who were esteemed in their community for their integrity, good character and sound judgment provided that no person could be selected who was under the age of twenty-one or over the age of sixty-five years or who was an habitual drunkard or who was afflicted with a permanent disease or physicial weakness if such would render him unable to discharge the duties of

a juror or one who could not read English or who had ever been convicted of any offense involving moral turpitude. However, if a person could not read English and had all the other qualifications and was a freeholder or householder, his name could be placed on the jury roll and in the jury box.

A casual reading of that provision of the law which provides the method by which the jury commissioners are to fill the jury boxes of their respective counties immediately discloses that there is vested in those men an irrevisible discretion. They are charged with the duty of placing on the jury rolls of their counties men who in their opinion possess the qualifications prescribed by statute. They could not put in the jury boxes or on the jury rolls of Jackson County, Alabama the name of a member of the African Race if they did not truthfully and honestly believe that that man possessed the qualifications prescribed by the statutes even though it might be expedient for the purpose of saving and preventing such litigation as this

The State having denied the allegations in the motions to quash filed by petitioner, we respectfully submit that the burden to establish the truthfulness of the allegations was upon the petitioner. This court held in *Martin vs. Texas*, 200 U. S. 316, as follows:

> While an accused person of African descent on trial in a state court is entitled under the Constitution of the United States to demand that in organizing the grand jury and empaneling a petit jury there shall be no exclusion of his race on account of race or color, such dis-

> crimination cannot be established by merely proving that no one of his race was on either of the juries and motions to quash based on alleged discriminations of that nature must be supported by evidence introduced or by an actual offer of proof in regard thereto.

and in *Tarrance vs. Florida*, 188 U. S. 519.

> An actual discrimination by the officers charged with the administration of statutes unobjectionable in themselves against the race of a Negro on trial for a crime by purposely excluding Negroes from the grand and petit juries of the county will not be pressumed but must be proved.

The motion to quash the indictment appears on pages 44-50 of the printed record. Petitioner and his codefendants made oath that the facts as alleged in the petition were true to the best of their knowledge and belief. Attached to the petition were Exhibits A, B, and C (51) (54) (56). These exhibits are in the form or nature of affidavits to the effect that the affiant is familiar with certain members of the Negro Race resident in Jackson County, Alabama and that said Negroes are, in the opinion of the affiant, possessed of all the qualifications prescribed by the laws of Alabama for serving on juries in the State of Alabama. It is passing strange that all of these exhibits or affidavits were made by parties or persons resident in Chattanooga, Tennessee. It is also strange that two of the affidavits were made before G. M. Chamblee, Jr., a Notary Public of Hamilton County, Tennessee, who is a son of one of the attorneys who represented the petitioner in the trial court.

It is definitely settled that the burden of proving that there was an actual discrimination against Negroes because they are Negroes, is upon the petitioner.

Tarrance vs. Florida, supra.

The fact that no one remembered seeing a Negro serve on the juries of Jackson County for a period of years is not conclusive proof that names of Negroes were not on the jury rolls and in the jury box from which were drawn the names of those individuals who comprised the grand jury which indicted the petitioner. Petitioner had several of his witnesses examine the jury rolls of Jackson County and it appeared that the names of several Negroes were on that roll. Although the Supreme Court of Alabama did not base its decision on that point, we respectfully insist that the evidence affirmatively shows the names of Negroes to be on the jury rolls. The evidence most certainly does not show that the names of Negroes were not on the rolls.

Admitting for the purpose of argument, however, that there were no names of Negroes on the Jackson County jury roll at the time the indictment against petitioner was found, we still insist that the proof utterly fails to show that they were not there because the Jury Commissioners systematically and arbitrarily exclude them therefrom solely because of the fact that their skin was black or because they were members of the African Race.

The Jury Commissioners will have to be branded as liars and presumptions will have to take precedence over positive statements of fact in order to

reach the conclusion that Negroes were excluded from the jury rolls of Jackson County because of race or color. Mr. Stewart, one of the Jury Commissioners, made the positive statement that the Jury Commission did not automatically or systematically exclude anybody. (85) Mr. Stewart also testified that the Jury Commission considered every man whose name was on the list presented to them by their clerk, Mr. Morgan. (85) (86) Mr. Morgan testified that he was clerk of the Jury Commission and that he compiled a list of the male citizens of Jackson County between the ages of twenty-one and sixty-five years without regard to their status or qualifications, and that the list contained the names of all the male citizens of the county. (74) (75).

The Circuit Court of Morgan County, Alabama saw the witnesses and heard their testimony. He heard the Jury Commissioner make the positive statement that the Jury Commission had not discriminated against any man because of race or color. The court heard the testimony given by the several colored witnesses in support of the motions to quash. He was in a position to pass on their ability to judge the qualifications of jurors. There was not presented to the trial judge one iota of testimony that definitely determined that there were no Negroes' names on the jury rolls. There was testimony to the effect that the names of several of them were on there. He saw and heard all the witnesses and was in a position to determine the interest of each in the case. The Supreme Court of Alabama saw no reason to upset his decision on the finding of fact.

We respectfully submit that the trial judge did not arbitrarily and unjustifiably deny petitioner's motion to quash but that on the other hand the overwhelming weight of the evidence is in support of his ruling.

This Honorable Court will not under the evidence in this case attempt to go into a county in the State of Alabama and say to the officials of that county who are charged with the duty of passing upon the qualifications of those persons who are to serve as jurors that there are Negroes whose names should be on the jury roll. Especially is this true where a trial court and the Supreme Court of a Sovereign State have positively stated that the evidence does not disclose that the petitioner was denied any consitutional right.

The evidence shows that the male population of Jackson County over the age of twenty-one and under the age of sixty-five was 8,801, and that of this number only 666 were Negroes. In other words, 93 per cent of the male population between the ages of twenty-one and sixty-five were members of the white race (92). It is also strange that of these 666 Negroes the colored witnesses used by the petitioner in support of his motion named only 37 who in their opinion possessed the qualifications necessary to service as a juror, which number is less than one-half of one per cent of the male population of the county between the ages of twenty-one and sixty-five and less than six per cent of the Negro population between the ages of twenty-one and sixty-five.

We respectfully submit that this Honorable Court will not disturb the decision of the lower court for the following reasons:

(1) That the petitioner's own witnesses testify that the names of Negroes were on the jury roll;

(2) That the petitioner has failed to prove that there has been an actual discrimination of members of his race because of race and color;

(3) That the decision of this case is based not on a question of law but on a question of fact and that this Honorable Court will not review a finding of fact by a State Court in the absence of a showing of such gross abuse as to amount to a denial of due process of law.

POINT II

MOTION TO QUASH VENIRE

The same procedure was followed in connection with the motion to quash the venire as transpired on the motion to quash the indictment. The state denied the allegations of the motion. The petitioner then introduced the evidence taken on this phase of the case in a former trial before Judge Horton held in the Spring of 1933.

The petitioner called a number of colored men who testified that in their opinion there were a large number of men of the colored race between the ages of twenty-one and sixty-five who possessed the qualifications required by law of those persons who are to serve as jurors. Several of the witnesses produced long lists of colored men whom they claimed possessed the requisite qualifications. (431-473)

The petitioner also produced several witnesses who testified that they had never seen a Negro serve on a grand jury or on a petit jury in Morgan County, Alabama.

There is no positive testimony to the effect that the jury rolls of Morgan County do not contain the names of members of the colored race. The burden is not on the state to prove that they are there but on the contrary it is on the movant to show not only that they are not on the jury rolls but their absence is due to the fact that the Jury Board arbitrarily and systematically excluded members of his race because of their race and color.

If the members of the Jury Commission are to be believed, no such discrimination was shown. On the contrary, it is imphatically disproved. These officers are clearly without personal interest in this case, and we submit that there is nothing in the record to justify the conclusion that they have deliberately testified falsely. The petitioner's contention cannot avail except that the conclusion be reached that the members of the Jury Board of Morgan County committed perjury.

Mr. J. A. Tidwell, a member of the Jury Board of Morgan County, testified that the Board selected the jury roll from a list of all the male citizens of the County between twenty-one and sixty-five years of age, irrespective of race or color. That inquire was made among various citizens, including some of the colored race, and that neither race nor color was considered by the Board in making up this roll. The

witness was shown the lists of names offered by defendant's witnesses as possessing proper qualifications, and stated that to the best of his recollection the Board considered the names of persons on those lists, sitting officially in their deliberations. (474, 480-491).

On page 491 of the record appears a statement of Mr. Tidwell's which positively discloses that members of the Negro Race were considered by the Jury Board. In answer to a question as to why the name of J. J. Sykes does not appear on the jury roll of Morgan County Mr. Tidwell said, "He is very badly crippled and when we were discussing his case, his fitness for jury service, we thought that his condition was such that he wasn't physically able for jury duty and we had other information which we thought might affect his character so as to bar him from the jury."

The remaining members of the Jury Board of Morgan County made affidavits containing the following statements, (492) (494).

> "That the clerk of the jury board, in pursuance to law, submitted to the jury board of which affiant is a member, a list containing the name of every male citizen of Morgan County, Alabama, between the ages of twenty-one and sixty-five years of age, which list, so far as affiant knows or can ascertain, was complete and correct. That from this list, the jury board selected those persons who, in their opinion, possessed the qualifications prescribed by law. That in the selection of those persons whose names appear on the jury roll and in the jury

box, the members of the jury board did not exclude any person because of race or color, but considered every man whose name was placed on the list submitted to them by the clerk of the jury board, and only excluded those persons who, in their judgment, did not possess the qualifications prescribed by statute and further states that their judgment was not arbitrarily arrived at, an inquiry being made whenever practical as to the qualifications of those persons whose names appeared on the list submitted to them by the jury clerk. Affiant further states that he cannot definitely state whether or not the names of colored men appear on the jury roll or in the jury box of Morgan County, inasmuch as it is impossible for him to know each person personally."

Sworn officers of the law, men possessing qualifications sufficient to cause them to be selected by the Governor of Alabama as the three men out of the entire population of Morgan County to serve in one of the most important capacities in the county have made two positive statements: (1) That they did not exclude Negroes from the jury rolls of Morgan County because of their race or color; (2) That they did consider members of the Negro Race when they were engaged in preparing said jury rolls. There is not one scintilla of evidence in the record in contradiction of these statements.

We especially call to the attention of this Court the case of *Green vs. State*, 73 Ala. 26, not that it could have any binding effect on this Court's decision but because it contains a most vivid and lucid discussion of the question at hand.

In view of the fact that the undisputed evidence in this case is to the effect that the Jury Board of Morgan County considered members of the Negro Race for jury duty and that none of that race was excluded because of race or color, we respectfully submit that the trial court could have come to no other conclusion than that reached.

CONCLUSION

The Supreme Court of Alabama has upheld the finding of fact made by a trial court of the State of Alabama. This Honorable Court will not review that finding in view of the fact that there was ample evidence upon which the ruling of the lower court was founded.

We respectfully submit that this Honorable Court will not upset the decision of a state court such as in this case where the evidence actually fails to show that petitioner has been denied any of his constitutional rights.

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APPENDIX

ALABAMA STATUTES

Act No. 47, H. B. 70, General Acts 1931, page 55 (Section 11).

Section 11. The clerk of the Jury Board shall, under the direction of the Jury Board, obtain the name of every male citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required of him by law under the direction of the Jury Board.

Act No. 47, H. B. 70, General Acts 1931, page 55 (Section 14) which is identical with Section 8603, Code of Alabama, 1923.

Section 14. The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.